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No. 00-1484

In the Supreme Court of the United States

NISSAN MOTOR ACCEPTANCE CORPORATION,
Petitioner,

v.

LEONARD APPLEBAUM,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Under this Court's Rule 29.6, petitioner's parent corporations are listed in the Rule 29.6 statement included in the petition for a writ of certiorari.

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INTRODUCTION

Two fundamental errors pervade each argument advanced in respondent's brief in opposition. First, in an effort to minimize the significance of the issues raised, respondent dwells on the fact that portions of the Federal Reserve Board's Regulation M have been amended since the leases at issue in this case were signed. Respondent fails to acknowledge, however, that these regulatory amendments did not alter the statutory and regulatory requirement that disclosures be made in a "clear and conspicuous manner." But it is this very provision that the Third and Seventh Circuits have interpreted inconsistently, and it is this conflict that petitioner, Nissan Motor Acceptance Corporation ("NMAC"), asks the Court to resolve. Respondent's failure to acknowledge that the central statutory and regulatory provision remains unchanged in the amended regulations renders his opposition largely unresponsive to the question presented in the petition.

Respondent's claim that the issue in this case is "all but moot" is in error. Even from the narrow perspective of disclosures of "residual value," thousands of leases entered before the regulatory change remain in effect, and many are the subject of litigation, including purported class actions. Moreover, even if new leases signed now will disclose the residual value amount in keeping with the revised regulation, the broader issue of whether, in this highly regulated area, courts should be permitted after the fact to add new substantive disclosure requirements in the guise of interpreting the "clear and conspicuous manner" requirement remains not only very much alive, but of critical importance to the leasing industry.

Second, respondent never even mentions, much less explains, the fact that the Federal Reserve Board regulations required residual value to be defined in open-end leases before the 1996 amendments. The Board's failure to require

similar disclosure in closed-end leases such as the one at issue here hardly can be treated as accidental. To the contrary, the governing regulatory agency elected not to impose a parallel requirement for closed-end leases, and that decision is entitled to deference from the courts. Regulated entities like NMAC cannot be expected to know by intuition that, although the Board has chosen not to require a particular disclosure, a court later will conclude that it was mandatory after all.

Rather than addressing the arguments actually made in the petition, respondent accuses NMAC of arguing that the pre-amendment Regulation M provided that "residual value *should not be* disclosed in a lease where the lessor chooses to implicate that value." Opp. 8 (emphasis added). Of course, NMAC argued no such thing. The issue is not whether the Board precluded or disapproved the disclosure or said that it should not be made; rather, the question is whether a court should *require* a lessor to make a further disclosure even where the Board has not done so. As this Court has recognized in the past, "[m]eaningful disclosure does not mean more disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure . . . and the need to avoid . . . [information overload.]'" *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980).

The petition seeks review of an important question of statutory construction over which the courts of appeals are divided. Review by this Court is needed if lessors are to be able reliably to determine in advance whether their leases comply with the Consumer Leasing Act ("CLA") and Regulation M, regardless of the geographical region in which their leases are executed, and without having to fear judicial second-guessing after many thousands of transactions have been completed.

I. THE THIRD AND SEVENTH CIRCUITS ARE DIVIDED OVER THE APPROPRIATE INTERPRETATION OF THE STATUTORY "CLEAR AND CONSPICUOUS MANNER" REQUIREMENT

Respondent denies that the holding below conflicts with the Seventh Circuit's decision in *Channell v. Citicorp National Services, Inc.*, 89 F.3d 379 (7th Cir. 1996), observing that *Channell* "had nothing to do with whether the vehicle's residual value had to be disclosed." Opp. 6. But this takes far too limited a view of the sharp disparity between the approach of the court below and that of the Seventh Circuit in *Channell*. The two courts of appeals disagreed over the meaning of the CLA's requirement that all disclosures be made in a "clear and conspicuous manner." *See* 15 U.S.C. 1667a. Under *Channell*, this requirement refers to "the mode of presentation," and means "visible, not simple." 89 F.3d at 382. If the *Channell* interpretation were applied in this case, NMAC would prevail. *See* App. 10a, 12a. But the court below held that, to satisfy the statutory "clear and conspicuous manner" standard, the language used must be not only legible, but also "reasonably understandable." App. 11a. For this reason, the court held, NMAC was required to disclose the amount of residual value that had been assigned to respondent's car. App. 15a.

These holdings are plainly in conflict. What's more, both *Channell* and the court below also declined to adopt the Second Circuit's statement in *Lundquist v. Security Pacific Automotive Financial Services*, 993 F.2d 11, 15 (2d Cir.), *cert. denied*, 510 U.S. 159 (1993), that disclosures must be simple enough for the average consumer to grasp. *See* App. 11a, 28a; *Channell*, 89 F.3d at 382, 383; *Jordan v. Toyota*

Motor Credit Corp., 236 F.3d 866, 867 (7th Cir. 2001).[1] Respondent's contention that review should be denied here because it was denied in *Lundquist* is insupportable. *See* Opp. 6 n.4. When this Court denied review in *Lundquist*, the oldest of these three cases, there obviously was no disagreement among the circuits. Now, in contrast, three courts of appeals have developed three different standards for determining whether the disclosure requirements have been satisfied. Review by this Court is necessary to resolve the disagreement among the lower courts and to enable lessors to know in advance the legal principles that will govern the thousands of standard form leases being entered every day.

The need for review is illustrated by a case that was decided earlier this year, after the petition in this case was filed but before respondent filed his Brief in Opposition. In *Clement v. American Honda Finance Corporation*, Civ. No. 3:95CV660SRU, 2001 WL 539582 (D. Conn. March 30, 2001), the plaintiff claimed that her lease violated the CLA and Regulation M because, among other things, the early-termination provision was not presented in a clear and conspicuous manner. The district court felt constrained to find a violation of the CLA because the clause at issue was almost identical to the one struck down by the Second Circuit in *Lundquist*. *Id.* at *5. The court acknowledged the circuit split over the meaning of "clear and conspicuous," noting that "[t]here is no question that if this case were decided in the Seventh Circuit a different outcome would be required." *Id.*

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[1] Inexplicably, respondent asserts (without citation) that both *Channell* and the court below agree that the purpose of the provision requiring disclosure of the lessee's liability at early termination in the CLA and Regulation M was to enable the lessee to determine on his own the amount of the early-termination charge. Opp. 6-7. In fact, as the citations in the text make clear, neither the court below nor the Seventh Circuit believed that the statute or the regulations require sufficient disclosure to allow the lessee to perform the mathematical calculation described in the lease.

(citing *Channell*, 89 F.3d at 383). The court suggested, however, that the same could not be said for the Third Circuit, which, according to *Clement*, applies a standard that is closer to *Lundquist* than to *Channell*. The court explained:

> In reaching the conclusion that the AHFC lease violates the CLA, it is not necessary to accept Clement's assertion that *Lundquist* holds that the "standard for determining whether a disclosure complies with the CLA is whether the formula is '*beyond the understanding of the ordinary consumer*.'" Pl. Mem. at 2 (quoting *Lundquist*, 993 F.2d at 14) (emphasis added). Whether the "understanding of the ordinary consumer" reference was a holding or dicta, *Lundquist* did hold that lease disclosures must "be reasonably understandable," *id.* at 15, which AHFC's disclosures are not. *See also Applebaum*, 226 F.3d at 220 (interpreting "reasonably understandable form" language of 12 C.F.R. pt. 213, supp. I, § 213.4(a)(1), and holding that "the method of calculating an early termination provision must not only be legible; it must also be 'reasonably understandable,'" not necessarily within "the understanding of the average consumer" but "reasonable depend[ing] on the surrounding circumstances.").

2001 WL 539582 at *6.

As *Clement* demonstrates, respondent's contention that the court of appeals' decision does not conflict with *Channell* is erroneous. Although *Channell* did not involve the term "residual value," *Channell*, *Lundquist*, and the court below all analyzed whether a specific early-termination provision was presented in a clear and conspicuous manner as required by the CLA and Regulation M. In each case, the court applied a different test to answer that question. That is a conflict that deserves resolution by this Court.

II. THE AMENDMENTS TO REGULATION M DO NOT OBVIATE THE NEED FOR REVIEW

Respondent attempts to minimize the importance of this case by pointing to the 1996 amendments to Regulation M.[2] Opp. 4. But the 1996 amendments involved only one aspect of this case. By requiring all leases—even closed-end leases—to disclose the amount of residual value assigned at the beginning of the lease term, the amendments made it unlikely that the precise lease form at issue here will be used again in the future. But this, of course, does not solve the problem created by the hundreds of thousands of leases that are already in effect, or that are the subject of ongoing purported class-action litigation. *See* Pet. 14 n.5. Although respondent attempts to distinguish other pending cases by stating that they involve claims in addition to the disclosure issue in this case, Opp. 5, the Florida state court action, which allegedly challenges more than 200,000 leases, makes virtually identical claims to those brought by respondent in this case. *See LaFramboise v. NMAC*, No. 00-007609 (Orange County Cir. Ct. filed Oct. 17, 2000).

Moreover, as explained above, the principal point of contention in this case is whether disclosures that are "clear and conspicuous" under *Channell* are sufficient to satisfy the lessor's disclosure obligations in the absence of a specific provision in the statute or regulations requiring more detailed presentation. This issue will recur, because the "clear and conspicuous" standard remains the operative standard for determining the sufficiency of disclosures required by the CLA and Regulation M. In addition, as mentioned in the

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[2] Respondent also tries to diminish the case's significance by belittling the amount in controversy, which he describes first as $1,000, Opp. 1, and later as $2,000, Opp. 4, before finally acknowledging that the court of appeals awarded $2,000 plus counsel fees, Opp. 10. Counsel fees also represent a substantial component of the recovery sought in the other pending cases cited in the petition.

petition, this standard is also used in a number of other regulatory regimes. *See* Pet. 21. Thus, fallout from the court of appeals' decision in this case will not be limited to cases involving "old-style NMAC leases" as respondent claims, Opp. 5, or even to cases under the CLA.

III. THE PRINCIPLE OF JUDICIAL RESTRAINT ARTICULATED IN *FORD MOTOR CREDIT COMPANY V. MILHOLLIN* SHOULD BE FOLLOWED IN THIS CASE

Respondent contends that the court of appeals was not required to defer to the Federal Reserve Board's decision to omit residual value in closed-end leases from Regulation M's detailed list of "specific disclosure requirements" because the Board did not publish staff commentary explaining its decision to do so. *See* Opp. 9-10. Although this Court, in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), did have the benefit of published commentary discussing the staff's interpretation of the matter there at issue, courts have applied the principles established in *Ford Motor* even where such express guidance from the agency is lacking.[3] These courts have found the absence of any regulatory provision imposing a particular requirement sufficient to indicate that the agency construed the statute as not imposing any such obligation.[4]

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[3] *See, e.g., Ritter v. Durand Chevrolet, Inc.*, 945 F. Supp. 381, 384 (D. Mass. 1996); *Gaydos v. Huntington Nat'l Bank*, 941 F. Supp. 669, 677 (N.D. Ohio 1996). The *Gaydos* court observed that the defendant's lease contained all of the information specifically set forth in the published model lease. *Id.* at 676. The same can be said in this case. As noted in the petition, the pre-1996 model lease contained an early-termination clause that provided simply that "[t]he charge for early termination is _____." 12 C.F.R. Pt. 213, App. C, Form C-2 at 357 (1995).

[4] *Ritter*, 945 F. Supp. at 384; *Gaydos*, 941 F. Supp. at 677; *see In re Thebeau*, 3 B.R. 537, 538 (Bankr. E.D. Ark. 1980); *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 345 (1982)

Respondent's reliance on *Christensen v. Harris County*, 529 U.S. 576 (2000), is misplaced. *See* Opp. 8. First, *Chistensen* did not purport to detract in any way from this Court's holding in *Ford Motor* that, where the Truth in Lending Act is concerned, the Federal Reserve Board's interpretations, even if informal, are treated as "authoritative." 444 U.S. at 567-68; *see id.* at 565. The Court based this conclusion on statutory provisions allowing lessors to rely in good faith on such interpretations.[5] *Id.* at 566-67; *see* 15 U.S.C. § 1640(f); *see also* 15 U.S.C. § 1667f(b). Second, the interpretation of the CLA advanced by NMAC is embodied in the formal regulations themselves, and thus is entitled to deference even under *Christensen*. *See* 529 U.S. at 587 ("Of course, the framework of deference set forth in *Chevron* [*U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)] does apply to an agency interpretation contained in a regulation.").

Moreover, although the court of appeals below did not have the benefit of explicit staff commentary from the Board stating that residual value need not be disclosed in closed-end leases, it was not operating in a vacuum. First, the staff commentary did emphasize that the statutory "clear and conspicuous manner" requirement focused on the "form" in which the disclosures were made. 12 C.F.R. Pt. 213, Supp. I, § 213.4(a)(1) cmt. 1, at 368 (1995). Second, as explained in

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("We view the absence of any provision for an affirmative defense in the ICC's credit regulations as an administrative construction of the statute that aids our determination of congressional intent.") (citing *Ford Motor Credit Co.*, 444 U.S. at 565).

[5] Respondent apparently read the references in the petition to the Federal Reserve Board's model forms as an invocation of this statutory defense, which he claims was waived. *See* Opp. 10. But NMAC cited to these forms merely as evidence that the pre-1996 regulation did not in fact require disclosure of residual value in an early-termination clause. *See* Pet. 9.

the petition, the Federal Reserve Board's regulations required lessors to disclose residual value in open-end leases, but made no such requirement for closed-end leases. *See* 12 C.F.R. § 213.4(g)(15) (1995); 61 Fed. Reg. 52,246, 52,251 (1996); App. 28a. This case, therefore, involves more than mere silence on the part of the agency. It involves a failure by the agency to require a particular disclosure in one instance, while the agency at the same time expressly required the same disclosure in other circumstances. NMAC was entitled to rely on this distinction—drawn in the regulations themselves—to conclude that disclosure in the circumstances of this case was unnecessary.

Finally, respondent incorrectly suggests that the legislative history of the CLA supports the court of appeals' holding that "meaningful disclosure" requires disclosure of residual value. Respondent's opposition takes out of context a passage from the Senate Report regarding "miscalculations of residual value." Opp. 8. This passage—which was not cited by the court of appeals—has no bearing on the requirement of "meaningful disclosure" because it is not related to the disclosure requirements at all. Rather, it discusses the CLA's substantive requirement that the residual value in an open-end lease be "reasonable."[6] *See* S. Rep. No. 94-590 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431, 433-34, 436-37. The statutory provision to which the Senate Report refers does not even apply to closed-end leases. Moreover, as the district court correctly observed, "[p]laintiff does not contend here that the residual value used was unreasonable." App. 30a

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[6] 15 U.S.C. § 1667b(a) ("Where the lessee's liability on expiration of a consumer lease is based on the estimated residual value of the property such estimated residual value shall be a reasonable approximation of the anticipated actual fair market value of the property on lease expiration."). The Act also creates a rebuttable presumption of unreasonableness wherever the estimated residual value exceeds the actual residual value by more than three monthly payments. *Id.*

The passage that respondent cites from the Senate Report is thus inapposite.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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